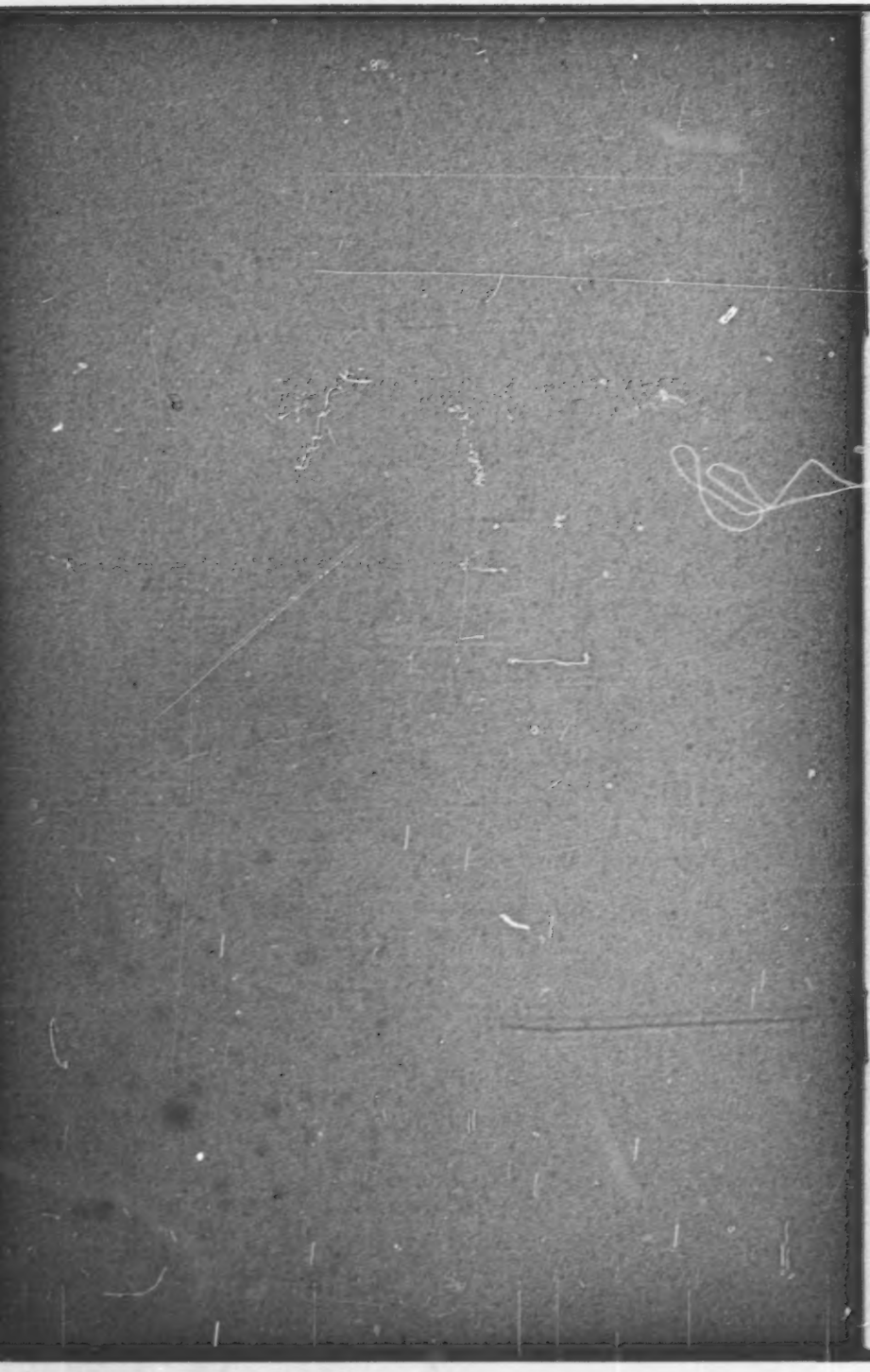

IN THE

MICHAEL RODAK, JR. CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-294

MITCHELL WATSON,
MENIFEE WATSON,
IDA MAE MULLINS,
JUDGE WATSON,
OLGA WATSON,
MANILEA ROWE and
RANDOLPH WATSON - - - - - Petitioners

versus

KENLICK COAL COMPANY, INC.,
TIP TOP COAL COMPANY, INC.,
SHERMAN BAILEY,
LEXIE BAILEY,
J. W. HOWARD and
FLORENCE HOWARD - - - - - Respondents

Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the exercise of private mineral rights by Respondents in strip mining coal underlying the surface of Petitioners constitute a taking of property

without just compensation in violation of the Fifth and Fourteenth Amendments so as to establish jurisdiction in the Federal District Court under 42 USC 1983?

2. Whether Kentucky's laws and regulations regulating strip mining and/or decisions of the Court of Appeals of Kentucky in unrelated cases, are sufficient state involvement requisite to Federal jurisdiction under 42 USC 1983?

STATEMENT OF THE CASE

Petitioners own an undivided interest (less than all) in the surface of a tract of land located in Magoffin County, Kentucky. In 1905 the coal and mining rights underlying this tract were sold by the remote predecessors in title of Petitioners. The Respondents, the Howards, are private citizens[1] who acquired such coal by mesne conveyances from the original grantee. Respondents, Kenlick Coal Co., Inc. and Tip Top Coal Co. are lessees of the Howards and engaged in strip mining one coal seam on the land. Respondents, Baileys, are officers of the coal companies. The coal companies were exercising, pursuant to their lease, such mining rights as were owned by the Howards.

The essence of the complaint is that Respondents, without the consent of Petitioners,[2] strip mined the

[1]Respondent J. W. Howard is now deceased, having died shortly after the decision in this case by the Court of Appeals and prior to filing this Petition.

[2]This surface was originally owned by Menifee Watson. Menifee Watson is deceased. His widow, Myrt Watson, survives him and has an interest in the surface but is not a party to this action. Petitioners are some (but not all) of the surviving children of Menifee Watson.

coal and that such mining destroyed the surface which constituted a denial of due process and a taking of the land without just compensation. Petitioners allegation of state action is premised upon the issuance of permits to strip mine by Kentucky and/or upon decisions of the Court of Appeals of Kentucky in unrelated cases.

Respondents were exercising rights granted to them under the express terms of the 1905 severance deed. This deed severed the mineral rights from the surface estate thereby creating two distinct and separate estates in the land. The deed conveyed all the coal in, on and under the land, contained no limitations or prohibitions on the method to be used to extract the coal, and contained an express waiver of damages.[2] Clearly, the surface estate was subservient to the mineral estate. The surface mining by Respondents was "contour" surface mining and not "flat" surface mining. In contour mining the coal is stripped from along the outcrop of coal seams high on the hills and not from flat surface, and such mining disturbs only that portion of the surface along the outcrop of the coal seam and disturbs only that portion of the surface hill land necessary to remove the coal.

In conducting their strip mining operations, Respondents were exercising property rights which they owned by virtue of the severance deed and for which Petitioners' predecessors in title had been paid.

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[2]The pertinent granting clause of the 1905 severance deed is copied in the opinion of the Court of Appeals (App. A, Petition—pp. 3(a)-5(a)).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Court of Appeals was clearly correct in holding that the strip mining on Petitioners' surface did not deprive Petitioners of their property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and that there was no such deprivation under color of state law. Under the severance deed the predecessors in title to Petitioners sold and gave up their right to prevent Respondents from strip mining and thus they have no such property rights which they now complain have been taken from them.

The regulation of strip mining by Kentucky does not constitute State action sufficient to support a claim under 42 USC 1983. The Respondents' right to strip mine did not originate with the State of Kentucky but originated from the rights acquired by the mineral owner under the severance deed.

Furthermore, the State regulations do not encourage strip mining but in fact restrict it. The State is not in any sense a "partner" or "joint venturer" in the strip mining, and the State laws and regulations in no sense encourage such. Likewise, the decisions of the Court of Appeals of Kentucky interpreting the "broad form" mineral deeds in unrelated cases (in which Petitioners were not parties) is not sufficient State action to support a claim under Section 1983. The right to strip mine was a property right acquired by the original grantee under the severance deed of 1905 and which right is now owned by Respondents.

To confer jurisdiction in the Federal Court under 42 USC 1983, there must be both a deprivation of a right secured to the Petitioners under the United States Constitution and State action. Neither element is present in this case.

I.

The Court of Appeals Was Clearly Correct in Holding That Strip Mining By Respondents Was Not a Taking of Petitioners' Surface in Violation of Their Fifth and Fourteenth Amendment Rights.

The disturbance of Petitioners' surface by the mining operations of Respondents was not a taking of property without due process. Respondents in their mining operations were exercising rights owned by them and acquired under the original severance deed. Petitioners' predecessors in title sold these rights and were paid for them. Petitioners cannot now claim that the exercise of these rights is an unlawful taking of their surface since they did not, and do not, own the rights which they complain have been "taken".

The Court of Appeals of Kentucky has consistently held that the "broad form" deed gives the mineral owner the right to strip mine. Only if this right is exercised in a wanton, oppressive, malicious or arbitrary manner, is the mineral owner subject to liability to the surface owner. See *Martin* v. *Kentucky Oak Mining Co.*, 429 S. W. 2d 395, 399 (1968); *Buchanan* v. *Watson*, 290 S. W. 2d 40, 43 (1956). And if mining is conducted in such a wanton, oppressive, malicious or arbitrary manner, the proper forum in an action for

redress is the State court and not the Federal Court—absent diversity which is not present here.

As was said in *Martin* v. *Kentucky Oak Mining Co., supra,* ". . . the mineral owner bought and paid for the right to destroy the surface on good faith exercise of the right to remove the minerals . . ." and consequently "there is no basis upon which there could rest an obligation to pay damages for this right."

Petitioners apparently contend that this interpretation of this type deed has denied them due process and constitutes a taking without compensation. The rationale of this argument is hard to follow. It seems well-settled that the rights and liabilities under a deed is a question of State law unless there is a violation of the Constitution or laws of the United States. See *American Railway Express Co.* v. *Kentucky,* 273 U. S. 269 (1927); *Tracy* v. *Ginzberg,* 205 U. S. 170 (1907); *Evans* v. *Abney,* 396 U. S. 435, 439, 443-44 (1970).

Decisions of State courts involving the ownership of property, cannot be said to deprive the unsuccessful party of property without due process simply because his claim was denied. The Federal court cannot act as a super legislature by setting aside the property law of the state even though the Court might consider the law unwise and harsh. The Kentucky Court in its decisions interpreting the "broad form" deeds did no more than apply well-settled general principles of Kentucky law and there is nothing indicated to show that the Court was motivated by an improper motive or that the broad form deeds were treated any differently from other deeds. Certainly there is nothing to suggest that

the Kentucky Court exercised its power arbitrarily or capriciously. On this point, Mr. Justice Harlan, in *Tracy* v. *Ginzberg, supra,* stated the following:

> "The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property . . . Under the opposite view every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of. The Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty."

The Court of Appeals for the Sixth Circuit, in *Peabody Coal Co.* v. *Pasco,* 452 F. 2d 1126, 1132 (6th Cir. 1971) in discussing the decision of the Kentucky Court of Appeals in *Martin* v. *Kentucky Oak Mining Co., supra,* said:

> "The court then considered some of the circumstances attending the execution of the 'broad form' deed involved. It was noted that in 1900 only 17 per cent of the land in Knott County, where the subject property was located, was improved agricultural land. Much of the *Martin* tract was

hillside land and of no productive value. The court weighed these facts against the argument that no farmer would intend that his *fields* be destroyed by mining operations. Also considered was the fact that in 1900 the average value per acre of land in Knott County was $2.90 while in 1905 only the mineral rights to the *Martin* tract were purchased for $3.00 per acre. The court apparently considered the evidence that the full value of the land had been paid to the grantor in evaluating the possibility that the original grantor in fact intended to convey the complete use of the surface and to retain bare title for whatever value it may have. Another circumstance mentioned was the fact that even in 1905 there were potential sources of damage to the land from customary deep mining methods. A final consideration examined by the court was that under a 'broad form' deed the surface owner reserved use of the land for agricultural purposes only to the extent that such use was consistent with the rights of the mineral owner. The court considered this factor as evidence that agricultural values were subordinated to mineral values. After considering the particular circumstances surrounding the execution of the *Martin* deed and the particular language of that deed the court held that 'the mineral owner bought and paid for the right to destroy the surface in a good faith exercise of the right to remove the minerals.' 429 S. W. 2d at 399."

From the foregoing it is clear that there was no taking or invasion of Petitioners' rights in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

II.

Adverse Prior Decisions of State Court Are Not Sufficient State Action to Attach Federal Jurisdiction.

It is recognized that a State court decision may be sufficient State action to create a cause of action under Sec. 1983. *Shelley* v. *Kraemer,* 334 U. S. 1, 14-18 (1948). Even then Federal jurisdiction is conferred by 28 U.S.C. 1343 (3) which is not pled or cited by Petitioners. This principle was recognized in the recent case of *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163 (1922). However, as pointed out in the opinion of the lower court (App. 18a-Petition) the distinguishing feature in those State action cases is the fact that the complaining party was a party to the State court proceedings. This is not the case here. Respondents have never been a party to any State court proceeding where the interpretation of a broad form deed similar to the one in this case was at issue. State action cannot be premised on the common law of a state as applied to different parties and different issues. To do so would be putting this court in the position of guessing or predicting the outcome of such a case.

Judge Swinford, in *Roberts* v. *Twin Fork Coal Company,* 223 F. Supp. 752, in discussing the import of *Shelley* v. *Kraemer,* supra, said:

> "The mere fact that the defendant finds comfort in the Kentucky decisions condoning strip mining in particular cases having no connection with the present controversy does not make the State an active participant in this case. Shelley v. Krae-

mer does not even intimate that state involvement in a particular transaction may be found in the fact that a state court decision in a similar but unrelated transaction has, by force of precedent, the power to determine the legal consequences. The petitioners in the federal phase of Shelley v. Kraemer were complaining of action by a state court in a case to which they were parties and which was specifically aimed at them. Here the plaintiff has never been directly subjected to action by the Kentucky Courts and his position is accordingly so dissimilar to that of the petitioners in Shelley that analogy between the two cases is imperceptible.

To hold otherwise would be to view the State an active participant in any private conduct that has consequences under the State common law and thus to subject it to evaluation by the federal courts according to its compliance with the Fourteenth Amendment."

A mere erroneous decision of a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Railway Express Company* v. *Kentucky, supra; Thompson* v. *Commonwealth of Kentucky,* 209 U. S. 340 (1927); *Defiance Water Co.* v. *Defiance,* 191 U. S. 184, 193 (1903); *Tracy* v. *Ginzberg, supra.*

The Court of Appeals was correct in holding that the decisions of the Court of Appeals of Kentucky are not sufficient to constitute the necessary degree of state involvement.

III.

State Regulations Not Sufficient State Action to Confer Jurisdiction

Kentucky has extensively regulated strip mining. Kentucky Revised Statute, Ch. 350. The issuance of strip mining regulations under KRS, Ch. 350, do not in any manner foster or encourage strip mining. If anything the regulations restrict and often proscribe such mining. The ownership of the minerals and appurtenant rights to mine are derived not from state law and regulations, but from the mineral severance deed.

To hold that such state regulations constitute state action would be stretching the "state action" concept very thin, in which event it would be expected the Federal courts would be inundated with cases arising out of such, or similar, state action.

As noted in the opinion of the Court of Appeals (App. 15a and b, Petition), Petitioners apparently consider that state action cannot be premised on a partnership, governmental function or entwinement theory, but seek to rely upon the "encouragement" theory and contend that the issuance of permits to strip mine is sufficient state action. They rely principally on *Moose Lodge No. 107* v. *Irvis,* supra, and *Public Utilities Commission* v. *Pollak,* 343 U. S. 451 (1952).

The principles enunciated in the above cases offer no comfort to Petitioners. The right to strip mine did not originate with the State of Kentucky but had its

origin in the mineral severance deed. Kentucky's laws are not aimed at the alleged wrong, nor do they encourage strip mining. The effect of these laws is to narrow and restrict Respondents' rights under the deed, which inures to the benefit of the surface owners.

The Court of Appeals was correct in holding that Kentucky's environmental laws and regulations are not sufficient to constitute the necessary degree of state involvement.

CONCLUSION

The jurisdictional elements required to create a cause of action under 42 USC §1983 do not exist in this case. There is no "taking" of the land of Petitioners within the meaning of either the Fifth or Fourteenth Amendments. The Petitioners have not availed themselves of the natural forum—the Courts of Kentucky—on the ground that prior decisions of that forum would render their efforts futile. Neither the decisions of the Kentucky Court of Appeals interpreting property rights under mineral severance deeds adverse to the contention of Petitioners nor the regulations of mining by the State of Kentucky can support a claim of "state action" within the meaning of Section 1983.

For the foregoing reasons, Respondents say that the Petition for a Writ of Certiorari should be denied, it is

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